No. 14,417

IN THE

United States Court of Appeals

For the Ninth Circuit

C. W. CAYWOOD,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

Appellant's Opening Brief

Appeal from the United States District Court
for the District of Arizona

DOUGLAS H. CLARK,
Security Building
Phoenix, Arizona

W. T. ELSING,
Title & Trust Building
Phoenix, Arizona

Attorneys for Appellant

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

INDEX

STATUTES

TEXTS

No. 14417

IN THE

United States Court of Appeals

For the Ninth Circuit

C. W. CAYWOOD,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

Appellant's Opening Brief

Appeal from the United States District Court
for the District of Arizona

JURISDICTIONAL MATTERS

On March 11, 1954 in the United States District Court for the the District of Arizona, Honorable Claude McColloch, Judge, presiding, the appellant C. W. Caywood and his co-defendant Harry Tompkins were found by a jury guilty of violating 18 U.S.C., Sec. 371 (Conspiracy) (T.R. 40). On March 15, 1954 the court entered an order that appellant be allowed until March 23, 1954 to file motions for a new trial and in arrest of judgment (T.R. 63). The motions were filed on March 17, 1954 (T.R. 66, 67), were denied on March 24, 1954 (T.R. 68) and on April 12, 1954 the court entered its judgment and commitment (T.R. 70). On the same day, Caywood filed a Notice of Appeal (T.R. 71).

The District Court had jurisdiction under 18 U.S.C. Section 3231. This Court has jurisdiction under 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

On January 18, 1954 a grand jury returned an indictment[1] charging that the appellant and his co-defendant Harry Tompkins conspired[2] "(1) to commit offenses against the United States of America, and (2) to defraud the United States of America and certain agencies thereof, in that said defendants conspired to violate 18 U.S.C.A. Sec. 1001[3] * * *". (T.R. 3).

Viewing the evidence in a light most favorable to the government, the facts are these.

The State of Arizona was receiving goods and materials from various agencies of the United States (such as the Navy, Army and Federal Security Agency) under 40 U.S.C.

---

1. The indictment as returned and the indictment which was considered by the jury in its deliberations was not the same, the clerk on the Court's order having lined out portions of it (T.R. 438). The lined-out portions are not printed in the Transcript of Record.

2. The conspiracy statute, 18 U.S.C. Sec. 371 reads: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

3. Title 18 U.S.C. Sec. 1001 reads: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Sec. 484 (j) (1) which provides in part that "Under such regulations as he may prescribe, the Administrator [of General Services] is authorized in his discretion to donate for educational purposes or public health purposes, including research, in the States, Territories, and possessions without cost (except for costs of care and handling) such equipment, materials, books, or other supplies under the control of any executive agency as shall have been determined to be surplus property and which shall have been determined * * * to be usable and necessary for educational purposes or public health purposes, including research."

The Arizona State Department of Education was eligible to receive such surplus property (T.R. 84, 88). The appellant from January 24, 1949 to January 25, 1951 was Assistant Superintendent of Public Instruction for Arizona (T.R. 146) and as such could sign requisitions for surplus property for the Arizona Educational Agency for Surplus Property (T.R. 113, 114). That Agency was to distribute the property to schools, but a Field Representative in the United States Office of Education in charge of donations (T.R. 87), in answer to the question "Now you advised him (the appellant) that if he couldn't get rid of this property to sell it, isn't that correct?" Testified, "Well, I might have, yes." (T.R. 108).

The requisitions were known as DP-2 Forms (see T.R. 92, 94 for examples). Among other matters they contained the following:

> "The applicant (the State Educational Agency for Surplus Property) hereby certifies that: 1. the applicant is an educational activity operated by a State * * * 2. the property requested will be distributed to eligible educational institutions for educational purposes on the basis of need and utilization." (T.R. 92).[4]

4. The language varied in other DP-2 Forms, but not in any material respect (see T.R. 94).

Some of the property which was shipped to Arizona by virtue of five DP-2 Forms bearing the appellant's name was not distributed to eligible educational institutions for educational purposes. It was ultimately converted by the defendant Tompkins for his and allegedly, the appellant's own use. The property was shipped to Arizona on the receipt by the proper United States officials of those five DP-2 Forms and consisted of a Quickway truck mounted crane (T.R. 197), three Harvester Company tractors (T.R. 176), a Northwest Shovel (T.R. 150), spare parts for a Caterpillar tractor (T.R. 185), and a generating set with tire vulcanizing equipment (T.R. 102), as described in the overt acts set forth in the indictment (T.R. 6 et seq.). When this property arrived in Arizona some of it was taken from the railroad yards in Phoenix to a ranch belonging to or occupied by the defendant Tompkins (T.R. 200). Some was taken from Florence, Arizona and on instructions from Tompkins was then delivered to a private concern in Phoenix (T.R. 245). Ultimately, it all went into the hands of private concerns who paid Tompkins for it (e.g., T.R. 309). Tompkins left the money (or at least some of it) with his attorney who deposited it in his, the attorney's, trust account for the credit of Tompkins (T.R. 332).

During this period, and while the appellant was with the Arizona Educational Department, he was also engaged quite extensively at various places in buying and selling all kinds of equipment and bidding for it at public auctions (T.R. 361, 362). The evidence on the part of the government to "tie" the appellant's activities in with Tompkins' consists of the following: An employee of the Arizona State Educational Agency was instructed by appellant to unload a Motor Crane from a railroad car. The following day the crane was unloaded and taken to Tompkins' ranch (T.R.

201). When asked who told him to take the crane to the ranch, the truck driver said "I guess Mr. Caywood did," but couldn't swear to it; it might have been Bruce Smith (also with the Agency) or anyone else in authority (T.R. 210). There was also evidence that on one occasion Caywood was seen with Tompkins at the ranch by a witness who was interested in buying equipment (T.R. 218, 219) and on another occasion at a junkyard in Phoenix (T.R. 229). The witness also saw Caywood and Tompkins together in Florence, Arizona and Caywood told the witness that if the latter would give him a list of equipment he desired Caywood would try to get it. (T.R. 222).

Tompkins' attorney testified that he gave a check to Caywood from Tompkins' account (T.R. 345) and some cash because Tompkins said Caywood would not accept another check (T.R. 350). Another witness testified that he compiled figures for Tompkins' attorney showing that Tompkins had paid Caywood about $10,000. In arriving at this figure the bookkeeper considered amounts paid to Tompkins by the State Tractor Company (T.R. 368). The State Tractor Company had bought some of the surplus equipment from Tompkins and had repaired some for him (T.R. 269 et seq.).

When the evidence was all in, the court struck from the indictment charges that the defendants were guilty of substantive crimes of embezzlement; for the court found that the surplus property coming to Arizona had ceased to belong to the United States (T.R. 445).

The case was submitted to a jury which returned a verdict of guilty.

Other facts appear in the argument.

THE QUESTIONS INVOLVED

The questions involved on this appeal are: (1) Was the prosecution barred by the statute of limitations? This is

considered under the argument relating to Specification of Error No. I. (2) Did the court err in giving and failing to give certain instructions? The balance of the argument deals with this question. As the instructions must be considered as a whole, for the convenience of the court they are set out in their entirety in an appendix to this brief.

SPECIFICATION OF ERROR NO. I

The prosecution was barred by the statute of limitations and the court erred in refusing to dismiss the indictment.

SPECIFICATION OF ERROR NO. II

The court erred in refusing to give the following instruction (T.R. 62):

> "At various times during my instructions, I have indicated that knowledge on the part of the accused is an indispensable element. I charge you that there is no duty whatsoever on an accused to prove that he had no such knowledge, because the burden of proof is upon the prosecution to prove beyond a reasonable doubt that the accused had the requisite knowledge."

The objection was raised thus (T.R. 447):

> "Mr. Ironside: Turning now to objections coming to instructions requested * * * 30 (T.R. 62), previously the court had indicated (T.R. 434) on the submission of these instructions prior to summation that the substance of each of these instructions would be given.
>
> The charge, as given to the jury, did not include the substance of these requested instructions were pertinent and necessary on each of the propositions of law indicated in order that the jury might understand properly and relate properly the fact to the appropriate law * * *".
>
> "Mr. Clark: I join in the exceptions * * *".

SPECIFICATION OF ERROR NO. III

The court erred in refusing to give the following instruction (T.R. 59):

> "At various times during my instructions, I have indicated that knowledge and a particular specific intent are both indispensable elements of the offense alleged. I charge you that if an accused does not have such knowledge, such particular specific intent cannot exist. To establish such particular specific intent, the evidence must be clear and certain and establish beyond a reasonable doubt that the accused had such knowledge. If the evidence as to such knowledge is not clear and certain, or if the evidence of such knowledge is uncertain or equivocal or ambiguous or doubtful, then I charge you such evidence would not establish that the accused had such knowledge or such particular specific interest."

The objection was raised thus (T.R. 447):

> "Mr. Ironside: Now referring to Instruction No. 24 (T.R. 59), which the court considered and declined to charge and the charge did not cover, as an independent and separate objection to each of the failures to charge each and all of those matters. The grounds are these:
>
> That the proposition is on the fact and on the matters in evidence. Each of those instructions state a proposition at law which is germane to the issues and is essential for a jury to be thus instructed in order that they may have a proper grasp and understanding of the fact and to understand in what relation to the charge those facts have held significance and held efficacy."
>
> "Mr. Clark: I join in the exceptions * * *".

SPECIFICATION OF ERROR NO. IV

The lower court erred in giving the following instruction (T.R. 441):

"Any improper interference with the United States Government in the discharge of its activities is deemed to be a fraud on the government. In other words, here the United States by statute was trying to do something for the Arizona schools and officials were trying to carry out their sworn duty to effectuate the object of the statutes. But that their functioning under that statute was interfered with improperly by Defendant Caywood and collaborated in by the other Defendant. In that they were not able to carry out that function that is the scheme or fraud on the Government."

The instruction is so erroneous and so prejudicial that it requires reversal per se. Objection was urged thusly (T.R. 448):

"Mr. Ironside: More specifically on those instructions, and I especially relate to those that have to do with the falsity of the statements, the DP-2 forms, the charge of the Court did not encompass all of the predicates upon which the facts are to be applied to determine legally not only the falsity but the connection of the falsity to the Defendant Tompkins and the same is true in connection with the Court's charge on the conspiracy itself and on the agreement * * *

"Mr. Clark: I join in the exceptions which Mr. Ironside has made."

SPECIFICATION OF ERROR NO. V

The court erred in its instructions to the jury in failing to read or explain the substance of 18 U.S.C., Sec. 1001, the statute which the defendants were charged with conspiring to violate. The error is so obvious and so prejudicial that this court will notice it.

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERROR NO. I

On a Conspiracy Charge, the Statute of Limitations Begins to Run From the Last Overt Act. Acts Done After the Object of the Conspiracy Has Been Accomplished Are Not Overt Acts.

The statute of limitations applicable to this case is three years.[5] The appellant moved that the indictment be dismissed on the ground that it was barred by the statute (T.R. 18). The motion was denied (T.R. 29). The motion was renewed at the close of the evidence and was again denied (T.R. 433).

The pertinent dates to be considered are these: The indictment was returned on January 18, 1954 (T.R. 16). The last DP-2 Forms which allegedly contained false claims were filed by the appellant on June 28, 1950 (See "Overt Acts" 5, 9, and 13; T.R. 7, 8, and 9). All the so-called "Overt Acts" set forth in the indictment which were performed subsequent to the critical date of January 18, 1951 (i.e., three years prior to the date of the indictment) consisted of sales by Tompkins and receipt of the sales price. (See "Overt Acts" 11, 12, 15, 16, 31, 32, 33, 34, 35, 38 and 39; T.R. 8-10, 13-16.)

The statute of limitations begins to run from the last overt act done to effect the object of the conspiracy. *Fiswick v. United States* (1946), 329 U.S. 211, 91 L. Ed. 196, 67 S. Ct. 224. Acts done after the object of the conspiracy is accomplished are not overt acts from the standpoint of the running of the statute. The applicable rule of law is thus stated in 15 C.J.S., *Conspiracy* Sec. 43, p. 1068:

---

5. Title 18 U.S.C. Sec. 3282 reads: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed."

> "The overt act must be a subsequent independent act following the conspiracy, and done to carry into effect the object thereof, *and cannot succeed the completion of the contemplated crime.*" (Italics added).

The indictment charges that the defendants conspired to commit offenses against the United States. The offenses were to knowingly and wilfully make false and fraudulent representations in matters within the jurisdiction of agencies of the United States, in violation of 18 U.S.C. Sec. 1001. The elements of a conspiracy under such an indictment are first, the agreement of the parties to commit a substantive crime or crimes; and second, an overt act to effect the object of the conspiracy. *United States v. Falcone* (1940), 311 U.S. 205, 85 L. Ed. 128, 61 S.Ct. 204. Although the overt act need not be the commission of the substantive crime, it may be. *United States v. Offutt,* 1942, 75 App. D.C. 344, 127 F.2d 336; *Baugh v. United States,* 9 Cir., 1928, 27 F.2d 257. In the indictment in the case at bar, the violations of 18 U.S.C. Sec. 1001 (i.e., filing the DP-2 Forms) are overt acts. Consequently, when the last violation was accomplished, the conspiracy succeeded and the statute began to run. See *Huff v. United States,* 5 Cir., 1951, 192 F. 2d 911.

To express it in another way, the indictment charges that the defendants conspired to present false claims to the government. Pursuant to the agreement, they presented such false claims, the last one on June 28, 1950. The object of the conspiracy was thus effected on that day and the period of limitations commenced. Because the defendants might later reap the benefit of their conspiracy, or because they may do acts to realize the fruits of their crime, does not again start the statutes to run; for, what happens after a conspiracy is finally accomplished is to be

regarded as a result of the conspiracy, not a part of it. So, it is said in *Hall v. United States,* 10 Cir., 1940, 109 F.2d 976, 984:

> "The overt act must be a subsequent independent act following the conspiracy and done to carry into effect the object thereof, and cannot succeed the completion of the contemplated crime."

A concrete example of the principle is found in *United States v. Black,* 7 Cir., 1908, 160 F. 431 affirming *Ex Parte Black, D.C. Wis.,* 1906, 147 F. 832.[6] There the defendants were indicted for conspiring (under the old section 88) to defraud the United States of title to public lands by making false entries. The scheme was this: the defendant Parker offered to pay the other defendants a sum of money if they would make fraudulent entries on the lands and when they received title to transfer them to him and others. This they did by filing false affidavits, securing from the government certificates of purchase and assigning them to Parker. The certificates of purchase were issued more than three years prior to the return of the indictment; but within the three-year period Parker paid the other defendants for their illegal acts. The court held that the object of the conspiracy was to illegally acquire the certificates of purchase; and when acquired (or when the false affidavits making possible the acquisition were filed) the object of the conspiracy was acomplished and subsequent acts, such as paying off the co-conspirators, could not logically be considered as effectuating the completed crime. Said the court:

> "Whatever may appear from the indictment as the relation of these payments and of the payees to the alleged conspiracy, the proof of the fact and date of

6. A part of the lower court's opinion may not express the law as it is now. But it is submitted that in regard to the point under discussion here, the decision is correct.

completion of entries and issuance of certificates of purchase establishes beyond controversy that each payment was made not as 'an act to effect the object of the conspiracy; nor to procure services to that end, but in settlement or payment for a pre-existing service or obligation * * *".

The lower court said:

"An overt act presupposes a pending conspiracy * * * It is a contradiction of terms to speak of an act done to effect the purpose of the conspiracy after the conspiracy has been accomplished."

In accord is *Lonabaugh v. United States,* 8 Cir., 1910, 179 F. 476. And in *United States v. Ehrgott,* C.C.S.D. N.Y., 1910, 182 F. 267 the judge said that an overt act cannot succeed the completion of the contemplated crime. In *De Luca v. United States,* 2 Cir., 1924, 299 F. 741, the defendants where charged with a conspiracy to defraud the United States by removal of opium from a bonded warehouse without payment of the duty thereon. The court said:

"As the trial progressed, it was argued by the defendant in error that the sale of the opium to some Chinaman was an overt act in furtherance of the conspiracy. * * * However, the overt act must be one which tends to further the conspiracy. If not, it is not an overt act, no matter what it may be called. * * * The object of the conspiracy charge was obtained as soon as the opium was out of the bonded warehouse * * * No act can further the conspiracy which transpires after the end of the conspiracy."

In *Rose v. St. Clair,* D.C. Va., 1928, 28 F.2d 189 the defendants were indicted for conspiring to deposit films of prize fights in the mails in violation of the Act of July 31, 1912, C. 263, 18 U.S.C. Sec. 405. The question before the

court was whether or not the public exhibition of the films after being shipped in interstate commerce constituted an overt act. The court said:

> "In the affidavit the 'object of the conspiracy,' within the meaning of the conspiracy statute, is confused with what may be conveniently called the ultimate purpose of the conspirators. The object of the conspiracy was to violate section 1 of the act of 1912; the ultimate purpose of the conspirators was to publicly exhibit the films in Virginia; and this clear and unavoidable distinction makes necessary the conclusion that the object of the conspiracy had been fully and completely effected when the interstate transportation of the films had been completed. It also follows that the subsequent exhibition of the films in this city, while it was an act done to effect the ultimate purpose of the conspirators, could not have been an act done 'to effect the object of the conspiracy.' When the object of a conspiracy has been fully accomplished, no act subsequently done can possibly be an act done to effect the object of the conspiracy. To speak of an act done after the object in view has been fully accomplished as an act done to effect such object is an absurdity."

Cf. *State v. Gregory* (1919), 93 N.J. Law 205, 107 A. 459.

The foregoing argument is equally applicable to a conspiracy to violate 18 U.S.C. Sec. 1001 and to a conspiracy to defraud the United States; for even under the latter, the last overt act would occur when the last piece of equipment acquired in pursuance to the conspiracy was converted to the defendants' use.[7] *Bellande v. United States,* 5 Cir., 1928,

---

7. The equipment which was sold within the three year period prior to the time the indictment was returned had long before been converted to Tompkins' use. The two tractors referred to in Overt Acts 12 and 16 (T.R. 9, 10) had been hauled on Tompkins' instructions from Florence to Phoenix, Arizona and put in a plant by

25 F.2d 1. But whether there is a distinction between the two conspiracies is a moot question under *Bridges v. United States* (1953), 346 U.S. 209, 73 S. Ct. 1055, 97 L. Ed. 1557. There the court said:

> "The Government contends that the General Conspiracy Act under which Count I is laid comprises two classes of conspiracies: (1) 'to commit any offense against the United States' and (2) 'to defraud the United States in any manner or for any purpose'. It urges that the indictment here charges a conspiracy to defraud the United States under the second clause. It suggests that, under that clause, proof of a specific intent to defraud is an essential ingredient of the offense and thus brings Count I within the Suspension Act. The fallacy in that argument is that, while the indictment may be framed in the language of the second clause, both it and the proof to support it rely solely on the fact of a conspiracy to commit the substantive offenses violating Sec. 346 (a) (1) or Sec. 346 (a) (5) [Nationality Act of 1940] as charged in Counts II and III. Count I actually charges that petitioner conspired to 'defraud the United States' only by causing the commission of the identical offenses charged in Counts II and III. The use in Count I of language copied from the second clause of the conspiracy statute merely cloaks a factual charge of conspiring to cause, or knowingly to aid, Bridges to make a false statement under oath in his naturalization proceeding, or to obtain by false statements a Certificate of Naturalization to which he was not entitled."

Tompkins for repairs which were charged to Tompkins, prior to September, 1950 when he asserted ownership of them (T.R. 246, et seq.). The tractor spare parts and the vulcanizing equipment and material referred to in Overt Acts 30 and 38 (T.R. 13, 15) were taken to Tompkins' ranch in 1949 (T.R. 218) where he tried to sell them in the year 1950 (T.R. 212, 214) and did sell some in that year (T.R. 217) and in that year engaged one McClintock to sell the rest for him on a commission basis (T.R. 302, 304). Certainly these were acts of conversion.

To conclude this portion of the argument: the alleged conspiracy was to file false claims; the false claims were all filed prior to June 29, 1950; therefore, the conspiracy was ended. It follows that the indictment was returned more than three years after the last overt act and its prosecution was therefore barred.

ARGUMENT IN SUPPORT OF SPECIFICATIONS OF ERROR NOS. II AND III

It Is Error for the Court to Fail to Instruct the Jury that Wrongful Intent Is an Element of Conspiracy and Must Be Established in Order for the Jury to Find Defendants Guilty.

The court in charging the jury gave no instructions relating to intent or knowledge. These matters, of course, are indispensable elements of conspiracy. *Mazurosky v. United States,* 9 Cir. 1939, 100 F.2d 958. The following taken from 15 C.J.S., *Conspiracy,* Sec. 45, p. 1071 is supported by numerous authorities:

> "To render the formation of a common design a criminal conspiracy, there must be a corrupt motive or intent, generally inferable whenever the means used are such as would ordinarily result in the commission of an unlawful act. * * * To constitute the criminal intent necessary to establish a conspiracy to commit an act prohibited by statute, there must be both knowledge of the existence of the law and knowledge of its actual or intended violation. Guilty knowledge of the act done by the conspirators or of the facts, the existence of which is essential to consummate the conspiracy, is a necessary element of the offense * * *".

Judge McCulloch in his well-framed instructions reported in *United States v. Belisle,* D.C. Wash., 1951, 107 F. Supp. 283 recognized this emphatically. In a detailed explanation of the requirement of specific criminal intent, he said among other things:

> "In connection with this kind of a charge, the Government must prove the act here of conspiracy, and that it is the sort alleged; more, it must prove that it was done and entered into with criminal intent, with specific criminal intent. * * * You have got to be doing something with a bad motive, with a bad heart. * * * You cannot find these defendants guilty unless you find, in addition to the conspiracy, if one existed, they did what they were doing, knowing it was wrong, and with specific intent to defraud the Government."

But in the same judge's instructions in the case at bar he did not mention a single word in reference to *mens rea.*

In *Morissette v. United States* (1951), 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288, which Judge McCulloch described as "classic in the American Federal field," the court said:

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."

And, according to the *Morissette Case,* it must be submitted to the jury however clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention. "Juries are not bound by what seems inescapable logic to judges."

The requested instructions relating to knowledge and intent are set out totidem verbis in Specifications of Errors Nos. II and III, supra. They assume that the court would instruct on this essential. (For example, the requested instruction quoted in Specification of Error No. III begins: "at various times during my instructions, I have indicated that knowledge and a particular specific intent are both indispensable elements of the offense alleged."). The balance of the desired instructions correctly state the law. They are "stock" instructions applicable to the case at bar; and

because they are accurate it is felt that there is no necessity to discuss them further. The lower court properly did not reject them because it believed them erroneous, for counsel were told that the instruction set forth in Specification of Error No. II would be given (T.R. 434); however, it was not, even in substance, although the failure to give it was brought to the court's attention (T.R. 447).

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERROR NO. IV

An Instruction that "Any Improper Interference with the United States Government in the Discharge of Its Activities Is Deemed to Be a Fraud on the Government" Is Erroneous and Is Prejudicial Particularly Where the Court Does Not Instruct the Jury that in Order to Constitute Fraud There Must Be Some Evil or Dishonest or Wrongful Intent.

More serious even than failing to instruct on criminal intent, the court actually inferred to the jury that it was not necessary that criminal intent be established. This point is made evident by the instruction set forth in Specification of Error No. IV, wherein the court instructed that "Any improper interference with the United States government in the discharge of its activities is deemed to be a fraud on the Government." Such is not the law. In order to commit a fraud upon the government there must be at least a knowing, intentional wrongdoing. So, in *Hammerschmidt v. United States* (1924), 265 U.S. 182, 44 S. Ct. 511, 68 L. Ed. 968, it is said

> "To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful government functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be

> defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention."

Under this rule a mere improper interference is not sufficient to constitute fraud. The interference at least must be by dishonest means. *Braatelien v. United States,* 8 Cir., 1945, 147 F.2d 889.

The word "improper" as it is commonly used and as it would be understood by a jury negates unlawfulness or intentional wrongdoing. Webster's New Collegiate Dictionary defines it as:

> "not proper; *a.* not appropriate, fit or congruous; * * * *b.* not accordant with fact, truth, or right procedure; incorrect; inaccurate."

Bouvier's Law Dictionary (Baldwin Ed. 1934) gives this definition: "not suitable; unfit; not suited to the character, time, and place. Improper conduct is such as a man of ordinary and reasonable care and prudence under the circumstances would have been guilty of." Ballentine Law Dictionary, 2 Ed. is substantially the same.

One can think of numerous acts that a person can perform which improperly interfere with the functions of the government. But it goes without saying that they do not constitute a fraud unless they have the element of intentional wrongdoing.

Nowhere in the instructions were the jury told that in order to find a verdict of guilty it was necessary for them to believe beyond a reasonable doubt that the defendants conspired[8] to do an intentional wrong. The matter is of

---

8. Even in regard to carrying the burden of proof in establishing the conspiracy, the court erroneously instructed (T.R. 442): "* * * If you find beyond a reasonable doubt [that] the circumstances indicate there was such an agreement between these parties, it will be your duty to find them guilty."

extreme importance, for the liberty of the appellant is at stake; and it is sincerely believed that if the court had properly instructed the jury it would have returned a verdict of not guilty; for it is inconceivable that the jury ever would have concluded that prior to the appellant's filing the particular DP-2 Forms which are involved in this case—or any other DP-2 Forms—that he and Tompkins had agreed that those DP-2 Forms would be false because they intended to divert the property called for from the schools. The jury probably felt that "something was improper" in the appellant's activities. But that is not sufficient on which to base guilt. The appellant could only be tried on the charges made against him by the indictment; not for some supposed crime, which in the untrained minds of the jurors may have been imagined.[9]

It is again strenously urged that the error is so prejudicial that it requires a reversal.

---

9. An isolated paragraph in the indictment (T.R. 5) charges that the defendants conspired to defraud the government by depriving it of its right to dispose of its surplus property according to law and conspired to defraud it by preventing its distribution to eligible educational institutions and conspired to defraud the government by converting its donable surplus property from such institutions to the defendants' own and others' use. The paragraph must be read with the whole indictment, as it is merely explanatory of the charge of conspiracy to violate 18 U.S.C. Sec. 1001 (see Bill of Particulars, T.R. 30). It could not be treated as a separate indictment, for alone it states no time when the alleged offense was committed, no place where it was committed, does not describe the agencies defrauded, nor the property converted, does not allege the acts were done "knowingly, wilfully, unlawfully," etc. See *Asgill v. United States,* 4 Cir., 1932, 60 F.2d 780.

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERROR NO. V

Failure of the Court to Define to the Jury the Substantive Offense Which Defendants Are Charged with Conspiring to Violate Is Reversible Error.

As has been said before, the indictment charged the defendants with conspiracy to commit offenses against the United States and to defraud the United States "in that defendants conspired to violate 18 U.S.C. Sec. 1001" (T.R. 3 et seq.). The court did not read Sec. 1001 to the jury when the instructions were given nor did it explain the substance of that statute.

The jury was told in very general terms what the indictment charged the defendants with doing.[10] But the jury was never given the opportunity to consider the evidence in relation to the law because the law was not read nor defined nor explained. The closest to an instruction relating to the substantive crime that the defendants were charged with conspiring to violate is this statement (T.R. 445): "They [the defendants] are on trial for a conspiracy to make false statements and by that means to defraud the government." But it is submitted that that is insufficient to enlighten the jury as to the contents of 18 U.S.C. Sec. 1001. To point out one example of its insufficiency, it omits to tell the jury that the statute requires that the false statement be made "knowingly and willfully."[11]

---

10. As will be seen in reading all the instructions, a good part are devoted to what the indictment charged and what the government claimed.

11. Exception was taken because the court refused to give the following instruction (T.R. 60): "Before it can be said that a, or any DP-2 form was a 'false' statement or representation, the burden is upon the prosecution to prove beyond a reasonable doubt that at the time the DP-2 form was filed it was intentionally, deliberately and wilfully untrue, and was then and there known to be thus untrue by the person who filed the DP-2 form." The instruction states good law. *Heindel v. United States,* 6 Cir., 1945, 150 F.2d 492, 497.

The following is the entire opinion of the court in *United States v. Yasbin,* 3 Cir., 1947, 159 F.2d 705:

> "An examination of the record in this case discloses that while the trial judge charged the jury as to the elements of the crime of conspiracy he did not instruct them as to the elements of the substantive offense involved in the conspiracy. Consequently the judgment of conviction is reversed on the authority of *United States v. Levy,* 3 Cir., 153 F.2d 995, *United States v. Noble,* 3 Cir., 155 F.2d 315, and *United States v. Max,* 3 Cir., 156 F.2d 13.

Compare *Moyer v. United States,* 9 Cir., 1935, 78 F.2d 624 where the court said that it was the better practice for the court to instruct on the elements of the substantive offense. But in the *Moyer Case* the instructions were detailed enough so that the jury knew what constituted the substantive offense.

The lower court did tell the jury "You will have the Indictment with you in the jury room, as is customary practice" (T.R. 438). But that does not cure the error; for in *Morris v. United States,* 9 Cir. 1946, 156 F.2d 525, 169 A.L.R. 305 it is said:

> "In the course of our research we have read decisions upon the point as to whether reference by the judge in his instructions to the information or indictment, which is handed to the jury to take to the jury room, is sufficient information of the offense charged. And the great weight of authority is that such practice is not sufficient. The court must directly and not by reference to a document in the jury's possession define the offense charged in clear and precise language."

This court on its own initiative will take cognizance of the fundamental error of failure to instruct on the essential questions of the law involved. *Samuel v. United States,* 9 Cir., 1948, 169 F.2d 787; Annotation in 169 A.L.R. 315.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be reversed.

DOUGLAS H. CLARK
Security Building
Phoenix, Arizona

W. T. ELSING
Title and Trust Building
Phoenix, Arizona

Attorneys for Appellant

(Appendix Follows)

APPENDIX

THE COURT'S INSTRUCTIONS TO THE JURY
(T. R. 438 et seq.)

The Court: This case, Ladies and Gentlemen, from the time it was started with the Indictment as the basis for prosecution, has been a conspiracy case. That is to say, these two Defendants were charged with a conspiracy to do something wrong.

I have taken out of the case, because I felt it was my duty to do so, certain of the charges and those have been lined out by the Clerk in the Indictment. So disregard the part that is lined out altogether in whatever attention you give to the Indictment. You will have the Indictment with you in the jury room, as is customary practice. It is not to be considered as evidence, merely a statement of the Government's charge against the Defendants.

Now conspiracy is a combination and agreement by two or more people to do something wrong. In this particular case, the matter has now been reduced to this charge, that these Defendants conspired to defraud the United States Government.

It is charged that they joined together in a mutual enterprise knowingly and criminally and with the full understanding on the part of each other of what they were doing; that they joined together in a scheme to get this Federal surplus property over here to Arizona and make personal use of it. Instead of allowing it to pursue the correct proper course of being distributed to the Arizona schools and school districts, the school system of Arizona.

In other words, that the Defendant Caywood was in an official position as assistant superintendent of public instruction, where he was the authorized officer under the

Arizona laws and was so recognized by the Federal Government, to apply to the various Federal authorities for allocation and shipment over here of various pieces of surplus property. And, of course, it was his duty then, after it got here, to see that it was applied to the uses for which the Federal Government sent it under the Federal statutes over here for educational purposes.

That is what the Federal law said, this type of surplus property could be donated, that meant given free of cost except transportation and handling costs, to the various states for educational purposes.

What the Government claims in this case is that Defendant Caywood joined in a scheme with the other Defendant to get the property on the pretense it was going to be used for those purposes and then, with the other Defendant, used it for their personal purposes.

The Government case hitches around these DP-2 forms. That was the form of application the Government devised for the handling of this surplus property for getting it into the hands of the state and there for distribution to the schools.

The particular false statement which the Government claims was made in these DP-2 forms—I notice their language is different in some of them — but I think this language or something like it is in all of them: "The property requested will be distributed to eligible educational institutions for educational purposes on the basis of need and utilization."

The Government charges in this case that was a false statement and, knowingly false, that Caywood signed or authorized to be signed, if you find that he did, that statement, knew that wasn't true; he knew he couldn't get the property unless he did sign it; but he knew he didn't intend

to do that. He knew he didn't intend to distribute it or see it was distributed to educational institutions but diverted it for his own profit along with the co-Defendant. That is the Government's charge in this case.

The other co-Defendant was in that scheme with him. The other Co-Defendant's part was to get the money out of the property after it got here. It was Caywood's part to get the property over here and the other Defendant's part to get something out the property after it got here. Later the money to be divided between them. That is the Government's theory in the case.

Now I speak of conspiracy as defrauding the Government. That is the statute under which this indictment is brought. Here is what that means:

Any improper interference with the United States Government in the discharge of its activities is deemed to be a fraud on the Government. In other words, here the United States by statute was trying to do something for the Arizona schools and officials were trying to carry out their sworn duty to effectuate the object of the statutes. But that their functioning under that statute was interfered with improperly by Defendant Caywood and callaborated in by the other Defendant. In that they were not able to carry out that function, that is the scheme or fraud on the Government.

I may say to you here now I have talked with you so far about the Government's theory. In a criminal case, the Defendant does not have to prove himself innocent. The Government has to prove him guilty. That is the way our law works. It has always been so in American history anyway. The Government has the burden of proof when it charges a man a criminal, the burden of proving him guilty.

Every Defendant is presumed to be innocent until proven

guilty beyond a reasonable doubt. That is the burden of proof the Government must satisfy in its charge here for verdict of guilty.

I said conspiracy is a combination of two people in agreement between them. That agreement doesn't have to be proved and can't always be proved by somebody who says "I overheard these people talking here and they made it up to do so and so." Oftentimes the proof has to be circumstantial.

Nobody has come in here nor is there any document to that effect that says Caywood and Tompkins at a certain time got together and worked up a scheme to do what the Government charges. However, there are facts and circumstances here which, if you believe them, you may infer that is what happened.

That is your job. You are triers of the facts, the credibility of the witnesses and the weight and value of the testimony. If you feel from the evidence, even though circumstantial, that these Defendants did have an agreement between them to do what the Government claims has been done here in an effort to subvert the functions of the United States Government in working this property out as to schools and the school system of the state of Arizona; if you find beyond a reasonable doubt the circumstances indicate there was such an agreement between these parties, it will be your duty to find them guilty. If you were not satisfied, it will be your duty to find a verdict of not guilty.

There is one more element in conspiracy under the American law not true in the English law but it is with us. You must not only be in agreement to do a wrong thing but one or more of the parties to the agreement must do some act which we call an overt act to carry it out, effectuate the agreement.

They have a lot of proof here that said certain acts were done, the signing of these DP-2's. If you find Defendant Caywood signed them or authorized them to be signed, that would be an overt act; the unloading of the property out here off the flatcar, hauling it to Tompkins' ranch, if you find that happened, that would be an overt act; selling the property, dividing the money.

You have had proof along all those lines. It is for you to say whether you accept it. But if you do find any things of that nature were done that would satisfy the requirement of overt act in the case.

There must be first the agreement to do this thing we talked about here so much, divert this property from the schools and school system here to their own personal use. First agreement, you have to find that existed beyond a reasonable doubt before you can return a verdict of guilty; second, some act by one or the other of the Defendants to carry out the agreement; likewise find one or more acts of that sort were done beyond a reasonable doubt before returning a verdict of guilty.

In determining whether the Defendants are guilty, here is the form of verdict you will have: We, the jury, duly impaneled and sworn in the above-entitled action, on our oath do find the Defendants ..... as charged in the indictment. You will fill in there, your foreman will when you elect him, what your verdict is, either guilty or not guilty. The two Defendants fall or stand together on the conspiracy charge.

Let me come back briefly to the discussion of conspiracy so that you will have clearly in mind the distinction between the conspiracy charge and the charge that the Defendants did what we call a substantive wrong. I see it is charged here that the Defendants defrauded the Government. By

that I mean kept it from carrying out its statutory functions in distributing this property among the school systems of the state. It is charged they conspired to defraud the Government by making these false applications, that Caywood made them; Tompkins was in on the deal and knew it was going to be done, had to be done, as a matter of fact, to carry out the scheme.

That charge might have been put in a different form. The charge might have been that Caywood filed false statements; that is not what he is charged with; that could have been enlarged that Caywood and Tompkins conspired and agreed that Caywood would file a false statement—no—pardon me, charge could have been made that Caywood made false statements; it could have been enlarged to include Tompkins as an aider and abettor, that Tompkins joined with Caywood to the extent any action on his part was necessary to file false statements. That would be a charge of what we call doing a substantive act.

That is not the way this is set up and these Defendants are not on trial for that. They are on trial for a conspiracy to make false statements and by that means to defraud the Government.

There was a charge in another indictment here that I have taken out of the case that you heard discussed in the opening statements of the case, that these Defendants embezzled this property you heard about here. That is a charge of a substantive act. That was based by the Government on the theory the property still remained the property of the United States Government here in Arizona.

I don't take that view of it. It seemed to me the Government ceased to be the owner of the property and so I dismissed the case as to that part but that would have been a substantive charge; they did something, embezzled the

property; that is out of the case. The trial is not about anything they did, it is about whether they had an agreement. That is what you are to consider. Did these people have an agreement between them? Did they make it up between them to agree, conspire to do these things?

You have to bring into these cases proof of what was done, that follows the agreement, if there was such an agreement. That is not what you are trying, if they did do those things, but to do those things convince you, all taken together, beyond a reasonable doubt, there was prior agreement to do them.

It is your duty to confer and deliberate with each other before arriving at a verdict, also the duty of each juror individually to consider the evidence and instructions. No juror should assent to a verdict he does not conscientiously believe to be a correct one and no juror who after such conferences and deliberations has reached a decision on the facts has a right to surrender his decision to the decision of the majority if he believes his decision is correct. The verdict of the jury must reflect the conscientious judgment of each juror.

You will take these exhibits with you to the jury room, give them the weight you think they are entitled to along with the evidence you have heard from the witness stand.

By any comment I have made on the evidence, I have not intended to indicate to you my opinion as to the guilt or innocence of the Defendants nor as to my belief or disbelief of any particular evidence.

I have only referred to it for the purpose of demonstrating within my acts of making plain to you what the law is that should control you in your consideration of the facts. If I gave you any impression to the contrary, please disregard it. You may retire. Please do not begin your

deliberations until we send you the exhibits. I have a particular reason for asking that. I thank you for your earnest attention. It was rather a long case.

(Whereupon the Jury retired.)